Nos. 11-338, 11-347

IN THE SUPREME COURT OF THE UNITED STATES

DOUG DECKER, the Oregon State Forester, in his official capacity, et al.,

Petitioners,

and

GEORGIA-PACIFIC WEST, INC., et al.,

Petitioners,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER,

Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICI CURIAE OF AMERICAN FOREST RESOURCE COUNCIL, PUBLIC LANDS COUNCIL, NATIONAL CATTLEMEN'S BEEF ASSOCIATION, MONTANA WOOD PRODUCTS ASSOCIATION INC., ARKANSAS FORESTRY ASSOCIATION, FEDERAL FOREST RESOURCE COALITION INC., AND MINNESOTA FOREST INDUSTRIES, INC. IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICI CURIAE*[1]

Amici Curiae represent companies and families that depend, in part, on federal forests and rangeland for their livelihood.

American Forest Resource Council (AFRC) is an Oregon nonprofit corporation that represents the forest products industry throughout Oregon, Washington, Idaho, Montana, and California. AFRC represents over 50 forest product businesses and forest landowners. AFRC's mission is to create a favorable operating climate for the forest products industry, ensure a reliable timber supply from public and private lands, and promote sustainable management of forests by improving federal laws, regulations, policies and decisions regarding access to, and management of, forest lands.

In states where AFRC members are located, they purchase the majority of timber from federal lands managed by the U.S. Department of Agriculture, Forest Service and U.S. Department of Interior, Bureau of Land Management (BLM). AFRC members also enter into long-term stewardship contracts on the federal lands that include forest restoration projects such as repairing roads and replacing culverts. AFRC members also own land adjoining fed-

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[1] The parties' were given at least ten days notice of *amici*'s intention to file a brief. All the petitioners and respondent have filed a letter of blanket consent to filing amicus briefs and letters are lodged with the Clerk. Pursuant to this Court's Rule 37.6, the *amici* submitting this brief and their counsel hereby represent that no party to this case nor their counsel authored this brief in whole or in part, and that no person other than *amici* paid for or made a monetary contribution toward the preparation and submission of this brief.

eral land that can only be accessed by crossing roads on federal land subject to permits, easements, and right of way agreements.

The Public Lands Council (PLC), headquartered in Washington, D.C., represents ranchers who use public lands and preserve the natural resources and unique heritage of the West. PLC is a Colorado non-profit corporation. PLC membership consists of state and national cattle, sheep and grasslands associations. PLC works to maintain a stable business environment for public land ranchers in the West where roughly half the land is federally owned and many operations have, for generations, depended on public lands for forage.

PLC members hold longstanding permits to graze on federal allotments. Many of them also own water rights, the claim to which depends upon those ranchers' continued beneficial use of the water, primarily through livestock grazing. PLC members develop and maintain water sources and other improvements on their allotments and use roads across federal land to manage vested water rights. Grazing allotment access roads often are the same roads used to remove logs from federal land. PLC ranching families also own millions of acres of range and forest land, some of which is intermingled with federal land and, like AFRC members' properties, can only be reached by roads crossing federal land. The use of roads on federal land is critical to their ability to continue properly managing natural resources and producing food and fiber for the nation and world. The loss of the exempt status of the roads these ranchers use would burden them with new permitting costs, and it would incite litigation against the

land management agencies, taking time and resources away from the already-belabored grazing permitting process. Thus, not only will PLC members' access be threatened; the renewal of their permits could be in jeopardy, as well.

The National Cattlemen's Beef Association (NCBA) is the national trade association representing the entire cattle industry. NCBA is a Colorado nonprofit corporation. NCBA represents nearly 139,000 cattle producers and 45 affiliated state associations throughout the United States. NCBA's membership includes cow/calf producers, seed stock operators; commercial feedyard operations; and also processing facilities. NCBA works to advance the economic, political and social interests of the U.S. cattle business and to be an advocate for the cattle industry's policy positions and economic interests. As individual entrepreneurs, cattlemen raise livestock in more states than any other commodity, helping sustain a way of life in thousands of rural communities. Its members are proud of their tradition as stewards and conservators of America's land and waters, and good neighbors to their communities. Many of NCBA's western members own water rights, hold federal grazing permits or own range and forest land intermingled with federal land. NCBA members use the same public roads to move cattle between their private property and federal allotments that are used to remove logs. Without reliable and prompt access, NCBA's ability to retain their water rights, protect the resource and stay in business is jeopardized. Adding another layer of permitting and increasing the opportunity for environmental litigation will also cause hardship for federal lands ranchers.

The Montana Wood Products Association, Inc. (MWPA) is a Montana nonprofit corporation promoting healthy forests and healthy communities through management of Montana's forests. MWPA's membership includes companies and individuals involved in all facets of Montana's wood products industry. This includes sawmills, manufacturers of plywood, particle board, fiberboard, pulp and paper, posts and poles, log homes, as well as timberland owners and managers and logging contractors. They produce value-added products through manufacturing and provide over 7,500 direct jobs for Montana families. Since about 60 percent of Montana's forest land base is owned by the federal government much of which is intermingled with MWPA member's private timberland, road access to and through these lands is vital to maintaining healthy forests, producing timber, and protecting lands from wildfire.

The Arkansas Forestry Association (AFA) is an advocate for the sustainable use and sound stewardship of Arkansas's forest resources to benefit AFA members and all Arkansans, today and in the future. AFA is an Arkansas nonprofit corporation. AFA members manage private forestland to produce essential forest products, while maintaining fresh water and air supplies, and enhancing fish and wildlife habitat. AFA represents one of the state's largest manufacturing sectors, which directly employs about 33,000 people with a $1.46 billion annually in payroll. National forests are an important timber source for AFA members in western Arkansas and AFA supports continued access to these forests. AFA has a longstanding interest in ensuring that the use of forest roads on federal land is subject to

best management practices and not NPDES permits. AFA was an intervenor in a case on the Ozark National Forest where the Eighth Circuit ruled that logging and road building was covered by EPA's silvicultural exemption from NPDES permits. *Newton County Wildlife Ass'n v. Rogers*, 141 F.3d 803, 810 (8th Cir. 1998).

The Federal Forest Resource Coalition, Inc. (FFRC) is a national coalition consisting of small and large companies and regional trade associations throughout the country whose members manufacture wood products, paper, and renewable energy from federal timber resources. FFRC is a District of Columbia non-profit corporation. Coalition members employ over 350,000 workers in over 650 mills, with payroll in excess of $19 billion. FFRC wants to ensure timely and effective access to federal lands to sustainably produce timber, pulpwood, and biomass and for prompt management to protect federal forests from insects, disease, and wildfire.

Minnesota Forest Industries, Inc. (MFI) represents forest products producers and landowners that are committed to conservation, quality forest management, and industry development that fosters sound environmental stewardship, multiple use of timberlands, and a dependable long-term timber supply. MFI is a Minnesota nonprofit corporation. Many of MFI's members purchase sawtimber and pulpwood from the Superior and Chippewa National Forests. MFI's members depend on timely access to these forests to complete timber sale contracts, particularly since access is limited during certain seasons. Disruption of access because of a time consum-

ing NPDES permit process would diminish an important supply of federal timber to our members.

Amici have an interest in this Court's review of the Ninth Circuit's decision that will effectively require federal land management agencies and private forest and rangeland owners to begin a lengthy and expensive process to obtain NPDES permits. Relying on Ninth Circuit Court of Appeals decision, environmental groups have already threatened to stop the use of roads on federal land under the Clean Water Act. U.S.C. §§ 1251 et seq. The NPDES permit requirements and associated litigation will significantly impede the ability of the Forest Service and the Bureau of Land Management to manage federal forests and rangeland, sell timber, issue grazing permits, repair roads, and restore forests and range to reduce the risk of wildfires. Wildfires on unhealthy federal forests and rangeland have burned onto *amici* members' private lands damaging forest and range resources including wildlife habitat and water quality. An onerous permitting process to keep roads open and maintained will increase the incentive for federal agencies to expand the obliteration and closure of roads and will discourage road maintenance. This will exacerbate the problem of federal, local, and private fire fighters being hindered by inadequate access in initial attack of fires during the critical first 24 hours after a fire starts and means fewer roads to use as a fuel break to control a fire. Thousands of acres have burned unnecessarily because of limited access.

PLC and NCBA (grazing *amici*) are deeply concerned with the prospect of having access to their members' grazing allotments prohibited or restricted

because of a requirement for NPDES permits for culverts and roads. Grazing *amici* are also concerned about access delays and restrictions impeding the development and maintenance of water improvements many of which support vested water rights. An expensive and lengthy permit process imposed on federal agencies to obtain NPDES permits will be detrimental to AFRC, MWPA, AFA, FFRC and MFI (timber *amici*) interests in obtaining timber from federal lands to run their mills. All *amici* have an interest in continued access to their members' private land using roads that cross intermingled federal land and the prospect of new avenues for environmental litigation against federal agencies further threatens *amici's* members' livelihoods.

SUMMARY OF THE ARGUMENT

This Court should grant the petitions for certiorari. The Ninth Circuit Court of Appeals failed to give deference to the Environmental Protection Agency's (EPA) long-standing interpretation that forest road construction, use, and maintenance from which there is natural runoff from rain does not require an NPDES permit under Section 402 of the Clean Water Act, 33 U.S.C. § 1342. By ignoring EPA's longstanding interpretation, the Ninth Circuit created a conflict with other circuits.

Rather than repeat petitioner's legal arguments in support of certiorari, *amici* want to emphasize that certiorari is also supported because of the exceptional importance of the Ninth Circuit's decision to the management of the vast acreage of federal forest and rangeland which supply timber and forage

for thousands of families and businesses in rural communities. *Leo Sheep Co. v. United States*, 440 U.S. 668, 678 (1979) ("Because this holding affects property rights in 150 million acres of land in the Western United States, we granted certiorari"); *Andrus v. Utah*, 446 U.S. 500, 506 (1980). The effect of the Ninth Circuit decision extends beyond non-federal lands and logging activity which are at issue in this case. The decision also applies to millions of acres of federal land and to the roads used to access timber sales on national forests and public lands managed by the Bureau of Land Management. The decision also affects ranchers who use roads on federal land to access their federal grazing allotments and to maintain water rights, and to intermingled private landowners whose lands can only be accessed by roads across federal land.

Amici agree with EPA's long-standing interpretation that logging which occurs over several months on a site on 20 to 40 year intervals is not an industrial activity and that natural runoff is best controlled by non-point source best management practices. 55 Fed. Reg. 47,990, 48,011 (Nov. 16, 1990). Logging on tracts of public land is even less frequent, often separated by intervals of 50 years or more. Nor is grazing an industrial activity when it occurs on a federal allotment where a pasture may be grazed for only a few weeks out of the year and the road used twice annually to bring livestock to and from federal pastures. Moreover, on millions of acres of federal land, the same road accesses both federal forest and pasture and an injunction or regulatory restrictions on hauling logs will harm ranchers who need to use the same roads to haul livestock.

ARGUMENT

Certiorari should be granted because the decision will broadly limit the federal land management agencies' ability to continue to sell timber, issue grazing permits, manage and authorize fencing and water source improvements, contract for road construction and restoration projects, and provide timely access to intermingled private lands that can only be reached across federal land.

A. This Case is of National Importance Because Resource Management of a Vast Area of Federal Forest and Range land is Likely to be Disrupted.

It is unclear whether timber purchasers, grazing permitees, road contractors, and stewardship contractors would be obligated to obtain NPDES permits and conduct the required monitoring or whether this would be the responsibility of the federal land management agency. Regardless of who is responsible for obtaining the permit and conducting the monitoring, it would be an extremely costly, time-consuming, and daunting task. Nationwide, the Forest Service has approximately 378,000 miles of roads under its jurisdiction covering 193 million acres. U.S. FOREST SERVICE, IMPLICATIONS OF DECISION IN NEDC V. BROWN TO SILVICULTURAL ACTIVITIES ON NATIONAL FOREST SYSTEM LAND, Doc. 1570-1, at 3 (Sept. 7, 2010). App. 1a. The Forest Service estimates that if it must obtain permits for roads under its control, it would have to obtain over 400,000 permits. The agency estimates it could take more than 10 years to complete the permitting process.

App. 6a. Even if the Forest Service can obtain programmatic permits by state, it estimates it would still take several years to obtain the necessary programmatic permits. *Id.*

Amici's concern that a vast acreage of federal lands will be drawn into this controversy is supported by actions of environmental groups. Three days after the Ninth Circuit filed its opinion, the Alliance for the Wild Rockies and the Selkirk Conservation Alliance filed a 60-day notice of intent to sue for violation of the Clean Water Act challenging the Lakeview-Reeder Fuels Reduction Project. App. 10a. The project involves road maintenance, road construction, and road storage and decommissioning to achieve long-term sediment reduction and watershed improvement on the Idaho Panhandle National Forest in Idaho. A complaint challenging the project was filed on October 6, 2010. *Alliance for the Wild Rockies v. McNair*, No. 2-CV-00504-EJL (D. Idaho) and the Forest Service subsequently withdrew the project and it has not been reoffered. Both the Forest Service and BLM have a large backlog of fish passage restoration work to replace road culverts that are blocked, poorly sized, or too far elevated above the stream. U.S. General Accounting Office, GAO-02-136, RESTORING FISH PASSAGE THROUGH CULVERTS ON FOREST SERVICE AND BLM LANDS IN OREGON AND WASHINGTON COULD TAKE DECADES (2001). An NPDES permit requirement to install replacement culverts will stall this fish habitat improvement work even further. Formal administrative protests have been filed to halt use of roads for projects involving log hauling and road rehabilitation work on BLM lands on the grounds that the projects need a Clean Water Act discharge permit.

See Administrative Protest of Evans Creek Project Decision Record and Finding of No Significant Impact as Implemented via the Skeleton Mountain Timber Sale, Klamath Siskiyou Wildlands Center, http://www.blm.gov/or/districts/medford/plans/evans/files/KSWildSkeletonProtest.pdf at 20.

Two projects in California have also been challenged on the grounds that the Forest Service has not obtained an NPDES permit for the silviculture, road use, and road restoration included in these projects. The first project is the Angora project in the Lake Tahoe Basin Management Unit that was prepared in response to the Angora fire within the Wildland Urban Interface (WUI) Defense Zone, which destroyed or damaged more than 250 structures on the South Shore of Lake Tahoe. *Environmental Assessment, Angora Fire Restoration Project,* USDA FOREST SERVICE (July 2010), http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5181776.pdf. The Angora project includes removal of dead and dying trees, relocating roads outside of streamside zones, replacement of undersized culverts, and construction, decommissioning, and restoration of roads. *Id.* The second project is the Klamath National Forest travel management plan that will prohibit off-highway vehicle travel in some areas and permit off-highway vehicle travel on other roads. *Final Environmental Impact Statement; Motorized Travel Management Plan (formerly Motorized Route Designation), Klamath National Forest California and Oregon,* USDA FOREST SERVICE (January 2010), http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5120060.pdf. Off-highway vehicles and federal roads are used by ranchers to administer their

federal grazing allotments, move livestock between pastures, and maintain fences and water sources. The administrative appeal argued that the Forest Service must obtain an NPDES permit which will delay much needed road restoration, culvert replacement, and forest health projects that lead to improved water quality.

B. The Imposition of a Time Consuming and Costly NPDES Permit Process on Federal Land Will Harm Struggling Forest Products Businesses that Rely on Federal Lands as a Source of Timber.

The extension of the Ninth Circuit's decision to federal forest land will adversely affect *amici's* members whether responsibility to obtain the NPDES permits and conduct monitoring lies with the federal agencies or *amici's* members who have contracts, permits, leases, easements, and right-of-way agreements with these agencies. In either case, the sale and removal of timber from federal land and the use of grazing allotments will be more costly and the approval process will be significantly delayed. Delaying federal timber sales now for several years through a costly NPDES permit process will threaten the operations of sawmills which are already struggling through the worst housing and lumber markets in this nation's history. *See generally, New Residential Construction,* U.S. CENSUS BUREAU, http://www.census.gov/const/www/newresconstindex.html; *Construction Statistics,* National Association of Homebuilders, http://www.nahb.org/reference_list.aspx?sectionID=130. In today's depressed markets private forest landowners tend to curtail the sale of their timber or export their logs. Timber sold from federal lands at

current market prices allows timber *amici* to be competitive in the depressed lumber market. *West Coast Log, Lumber Exports Soar in First Half of 2011,* Forest Business Network (September 3, 2011), http://www.forestbusinessnetwork.com/7170/west-coast-log-lumber-exports-soar-in-first-half-of-2011/. Furthermore, maintaining a steady supply of public timber at current market prices is crucial to help existing milling infrastructure survive which is also needed to help fight the forest health crisis on federal lands. Kramer, *Forest Service Says Lack of Sawmills Hurting Forests,* Wenatchee World, (April 12, 2011), http://www.wenatcheeworld.com/news/2011/apr/02/forest-service-says-lack-of-sawmills-is-hurting/. Delaying public timber sales now for several years by requiring a costly NPDES permit process for the use of logging roads will threaten the already tenuous operations of sawmills, and of road and stewardship contractors that provide scarce jobs to support the struggling economies of rural communities. In order for the installed milling capacity and the skilled woods workers who support it to survive to better times, it is vital that the timber supply from public lands not be further curtailed by an NPDES permit process. If this infrastructure is lost by further constraining the supply of timber, it is unlikely that the investment will ever again be made in this industry and the loss of jobs will become permanent. This will devastate already struggling rural communities.

C. The Imposition of a Time Consuming and Costly NPDES Permit Process on Federal Land Will Harm Ranching Families and Businesses that Often Use the Same Roads Used for Logging on Federal Land.

Ranching families and businesses face similar concerns regarding the Ninth Circuit decision as they depend on "logging" roads to access their grazing leases on federal land. Since federal regulations discourage construction of duplicate roads, separate road systems have not been created for each specific purpose. *See e.g.* 43 C.F.R 2812.0-6(a) ("the intermingled character of the O. and C. lands presents peculiar problems of management which require for their solution the cooperation between the Federal Government and the owners of intermingled lands, particularly with respect to timber roads . . . the duplication of an existing road reduces the value of the federal and other timber which is tapped by the existing road."). Federal roads are used by loggers and ranchers alike. If the use and maintenance of a "logging" road on federal land without an NPDES permit violates the Clean Water Act, then invariably the Forest Service or the BLM will preclude the use of the road for hauling logs, livestock, or other commercial products until the an NPDES permit is issued. If the agencies choose not to preclude use of a logging road pending completion of an NPDES permit, then environmental groups undoubtedly will seek a judicial order to preclude the use of the road more broadly. App. 10a.

D. The Imposition of a Time Consuming and Costly NPDES Permit Process on Federal Land Will Harm Intermingled Landowners who Require Access Across Federal Land.

Federal land is often intermingled with private land and the use of private land is dependent upon access across federal land. *See e.g.*, E. RICHARDSON, BLM'S BILLION – DOLLAR CHECKERBOARD, MANAGING THE O & C LANDS (1980). *Amici* who have inholdings and must access their forest or range land across roads on federal land face the prospect of being denied access while waiting for federal land management agencies to complete the NPDES permit process.

CONCLUSION

Because the Ninth Circuit's holding that NPDES permits are required for logging roads incorrectly applied the law, will extend to millions of acres of federal forestlands, rangelands, and intermingled private lands, will impose a new costly and time consuming permit process on federal land, and will increase the already abundant litigation over the management of federal land, *amici* respectfully urge the Court to grant the petition for writ of certiorari to review and reverse the decision to ensure that it is consistent with other intra-circuit precedents and affords the EPA the deference that it deserves.

Respectfully submitted,

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